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8 **IN THE UNITED STATES DISTRICT COURT**

9 **FOR THE DISTRICT OF ARIZONA**

10 United States of America,

Case No. 2:19-cr-00898-DLR (DMF)

11 Plaintiff,

**DEFENDANT'S RULE 33 MOTION  
FOR A NEW TRIAL**

12 vs.

13 David Allen Harbour,

(Oral Argument Requested)

14 Defendant.

15  
16  
17 Defendant David Allen Harbour, by and through his attorneys, respectfully  
18 moves this Court to vacate the judgments against him and grant a new trial pursuant to  
19 Federal Rule of Criminal Procedure 33.

20  
21 “Upon the defendant’s motion, the court may vacate any judgment and grant a  
22 new trial if the interest of justice so requires.” Fed. R. Crim. Pro. 33(a). Other than  
23 motions brought on the grounds of newly discovered evidence, a motion for a new trial  
24 must be filed within 14 days of the verdict being returned. *Id.* at (b). A district court has  
25 the power to grant a motion for a new trial. *United States v. Kellington*, 217 F.3d 1084,  
26 1095 (9th Cir. 2000), *disapproved of by Washington v. Poole*, 507 F. Supp. 2d 342  
27  
28

(S.D.N.Y. 2007); *United States v. Lincoln*, 630 F.2d 1313, 1319 (8th Cir. 1980). In a motion for a new trial, the court does not view the evidence in the light most favorable to the verdict and may weigh evidence and evaluate the credibility of witnesses. *Id. see also United States v. Williams*, No. CR 2:08-376 WBS, 2014 WL 4417406, at \*1 (E.D. Cal. Sept. 8, 2014), *aff'd*, 673 F. App'x 620 (9th Cir. 2016). A verdict may be set aside and a new trial ordered if the court concludes that, while in theory evidence may be sufficient to sustain a conviction, the evidence weighs against the verdict returned by the jury. *United States v. A. Lanoy Alston, D.M.D., P.C.*, 974 F.2d 1206, 1211 (9th Cir. 1992); *United States v. Ionutescu*, 752 F. Supp. 2d 1091, 1095 (D. Ariz. 2009).

## ARGUMENT

1. The evidence presented at trial was not sufficient to sustain a guilty conviction.  
 “If the court concludes that, despite the abstract sufficiency of the evidence to sustain the verdict, the evidence preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred, it may set aside the verdict, grant a new trial, and submit the issues for determination by another jury.” *Lincoln*, 630 F.2d at 1319.

This case is a poster-child for the granting of a new trial as is shown in the renewal of the Rule 29 Motion which is also being filed as of this date. To save space, the substance of the renewed Rule 29 Motion is incorporated by reference as if fully set-forth herein.

Here, we analyze the evidence with respect to each of the three alleged remaining victims, PAIF, Turasky, and Burg.

## **PAIF - \$1.1 Million**

The easiest to dispatch is PAIF but only if the Court, as it should have done so and as it still should do, mandates that the government adhere to what it claimed the fraud was. With respect to PAIF, the SSI stated:

24. From the beginning of the business arrangement with PAIF, HARBOUR manipulated the records to his advantage in order to entice PAIF to fund the draw requests. The records included a spreadsheet that gave a false impression of the lending portfolio and the status of Green Circle. For example, per the guidelines of funding, customers who were in arrears with the Green Circle payday lending were barred from receiving any new loans. Instead, HARBOUR issued new loans to the borrowers who were about to go into default, which absorbed the old loans. HARBOUR misrepresented to PAIF that Green Circle was a functional and profitable portfolio and that the loans were performing and not in default. PAIF relied on this information for their lending decision and would not have provided funds if the borrowers' loan status was accurately represented. HARBOUR never disclosed to investors that the loans were non-performing.

The only evidence in the case presented by the government was through Laura Purifoy. She testified that, some unknown number of months after OakTree's receipt of \$1.1 million, Harbour made pen and ink changes to the borrowing base spreadsheet, that she alerted Stefan Andreev, at Green Circle and that Stefan Andreev agreed that the changes proposed by Harbour should be rejected.

The government never even introduced any evidence that met the allegations of ¶

24. The only documents introduced with respect to PAIF were drafts of the first borrowing base (for the month after) the month in which the payment was made and which showed that the parties (Green Circle, PAIF, and OakTree) were trying to determine how to best portray the borrowing base. There were four competing versions of

1 how to represent it, with PAIF CEO Bob Ferrell making the final decision in mid-  
2 September 2015.

3 There was a complete failure on the part of the government to prove what it  
4 alleged in ¶ 24. No witnesses from PAIF ever testified that PAIF received a fraudulent  
5 borrowing base after years from hearing from the government that either Mr. Burgess or  
6 Mr. Primus would be the key witness in providing the false borrowing base calculations.  
7 The government never provided any actual borrowing base calculations that were  
8 supposedly relied upon by PAIF to advance any monies to Green Circle, let alone the  
9 \$1.1 million. More importantly, Ms. Purifoy admitted not knowing which borrowing  
10 bases were marked up and not knowing what happened to them after she sent them to Mr.  
11 Andreev except that she stated he also rejected Mr. Harbour's changes. Therefore, how  
12 could any rational person surmise that the changed borrowing base calculations ever  
13 made it to PAIF without someone from PAIF saying they did? What we do know from  
14 Ms. Purifoy, is that Mr. Harbour and Ms. Purifoy did not have the ability to alter the  
15 actual customers of Green Circle because they did not have access to the loan  
16 management software, which is in direct contradiction to paragraph 24. Finally, Ms.  
17 Purifoy stated she had nothing, zero to do with any documents financial or otherwise with  
18 the approval of the \$1.1 million from PAIF to Green Circle.

23 Exhibit 516, analyzed in depth in connection with the renewed Rule 29 Motion  
24 makes the government's problem worse with respect to PAIF and, for different reasons,  
25 also worse with respect to Turasky and Burg. With respect to PAIF, the June 23, 2016  
26 email enclosing the Green Circle bank records and a spreadsheet prepared by Laura  
27

1 Purifoy, came almost a year after PAIF's repayment of \$1.1 million advanced to Green  
2 Circle by OakTree. So, although the government relied on it to show that PAIF relied  
3 upon it in making the payment 10-months earlier, that attempt was both absurd and false.  
4 The June 23, 2016, email and schedules could not have influenced a payment made 10-  
5 months earlier.

7 Last, with respect to PAIF, its seizure of \$1.9 million of OakTree money in Green  
8 Circle's account in September 2016, offset any loss that may have been suffered  
9 when it fulfilled the \$1.1 million draw request on August 11, 2015.  
10

11 **Turasky - \$350,000 or \$500,000**

12 This is what the evidence showed:

- 13 • Turasky sent \$500,000 to OakTree and received \$150,000 back from OakTree the  
14 next day.
- 16 • Turasky's lawyers drafted the documents.
- 17 • The documents gave Harbour authority to use the funds precisely as he used the  
18 funds.
- 20 • OakTree regarded Turasky as having put in \$350,000.
- 21 • Turasky testified that Harbour was permitted to use the \$350,000 to cover business  
22 expenses, provided that, at some point, the entire \$350,000 would be used to  
23 generate the returns to Turasky that he expected to receive.
- 25 • The unrebutted evidence is that Turasky's \$350,000 was used, in part, to pay  
26 OakTree expenses.

- 1     • Exhibit 516 showed, unequivocally, that all of Turasky's \$350,000 reached Green
- 2                 Circle's bank account by December 14, 2014.
- 3     • Purifoy's schedule
- 4     • Ms. Paige's and Ms. Cameron's assessments may be viewed harmoniously and
- 5                 doing so reaches the same result.
- 6     • Eventually, Turasky's \$350,000 all reached Green Circle. It formed part of the
- 7                 \$1.8+ million that PAIF foreclosed. Exhibit 516 shows the \$1.8 million in the
- 8                 Green Circle account in 2016.
- 9     • Therefore, the jury could not have found that Harbour kept all Turasky's money.
- 10     • From the evidence admitted without any objection or any objection being
- 11                 sustained, the jury could only have found that Turasky agreed that Harbour was
- 12                 entitled to use the \$350,000 for expenses provided that it eventually reached Green
- 13                 Circle and that is exactly what happened.
- 14     • What were the misrepresentations?
- 15     • What was the fraud?
- 16     • The SSI plead solely that the fraud was Harbour's failure to tell Turasky that he
- 17                 would and could use Turasky's \$350,000 for expenses.
- 18     • If the government is relying on material omissions to support the alleged fraud,
- 19                 they are not pleaded anywhere in the SSI.
- 20     • The SSI did not plead any omissions of material facts which, had they been known
- 21                 to Turasky, would have led him to reject the infusion of the \$350,000.
- 22
- 23
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Burg - \$1 Million

- Like Turasky, Burg's lawyers drafted the operative documents.
  - Like Turasky, Burg and Avedon also testified that Harbour could use the \$1 million to pay expenses provided that eventually the \$1 million would be put into Green Circle to generate returns.
  - This is precisely what occurred.
  - Exhibit 516 shows Burg's money (OakTree) and the Joplin Group money that replaced the Burg money (\$400,000) used for expenses.
  - Burg's \$1 million was part of the \$1.8 million in the Green Circle account when PAIF seized the account in September 2016.
  - From the evidence admitted without any objection or any objection being sustained, the jury could only have found that Burg agreed that Harbour was entitled to use the \$1 million for expenses provided that it eventually reached Green Circle and that is exactly what happened.
  - What were the misrepresentations?
  - What was the fraud?
  - The SSI plead solely that the fraud was Harbour's failure to tell Burg that he would and could use Burg's \$1 million for expenses.
  - If the government is relying on material omissions to support the alleged fraud, they are not pleaded anywhere in the SSI.
  - The SSI did not plead any omissions of material facts which, had they been known to Burg would have led him to reject the infusion of the \$1 million.

1       2. The introduction of other ‘victims’ not charged in the indictment was unfairly  
2       prejudicial.

3             Since the outset of this case, the Defense has strenuously objected to the  
4       government being permitted to introduce evidence of individuals who were not named as  
5       victims in the Counts of the indictment but whom, nonetheless, were portrayed as victims  
6       by the government. Rejecting the sound defense argument that Federal law does not  
7       criminalize general schemes and artifices to defraud that would be chargeable under  
8       Federal law but only use of the facilities of interstate wire communications in furtherance  
9       of a scheme and artifice to defraud the victim associated with the count or counts of the  
10      indictment, the Court decided to permit the government to offer this evidence only if the  
11      government could meet the two-prong test it set-forth: that one or more of the Group of  
12      Five listed in the indictment (Burg, Turasky, PAIF, Willson, and/or Hill) both were  
13      attracted to making the Investment because of Harbour’s wealth or its appearance and  
14      that the wealth came from a funds obtained via fraud. *See*, RT, January 17, 2023, p. 160-  
15      161 and p. 163, ll. 9-16; p. 165, l. 16 -p. 166, l. 1; p. 167, ll. 21-25.

19             First, the jury rejected the unsophisticated alleged victims, Willson and Hill  
20      altogether. Second, there was no evidence that Turasky met the first part of the test  
21      (knowledge of wealth). However, assuming arguendo that he did, and that Burg was  
22      impressed with Harbour’s supposed wealth, no link was never established between the  
23      wealth or its appearance and funds obtained by fraud to pay for the wealth.

25             The governments entire case was based around the theory that Mr. Harbour  
26      defrauded numerous people for tens of millions of dollars. Even now, post-conviction,  
27      the government is parading this case as a fraud in excess of \$20 million dollars and that

1 extended from 2007 to 2021<sup>1</sup>. This is completely inaccurate; the charges of which Mr.  
 2 Harbour was convicted have a putative loss of \$2.45 million.<sup>2</sup> No conduct engaged in  
 3 prior to July 2014 was the subject of any conviction. It is obvious the government  
 4 intended to prejudice the jury against Mr. Harbour by introducing evidence that should  
 5 have been excluded under Fed. R. Evid. 403 and 404. In short, what the evidence showed  
 6 was that all the luxury items were purchased between 2011 and 2013 and that the source  
 7 of the purchases was money received from Canyon Road and KSQ. The failure of the  
 8 government to prove that fraudulently obtained money paid for the wealth Harbour  
 9 acquired meant that the evidence of the wealth should have been excluded. Having  
 10 created a test, the Court then failed to impose the test on the government.  
 11

12       The second test the government also failed was the requirement that, in order to  
 13 admit the Bobrow, Jackson, and Gray alleged frauds, it needed to tie the payment of  
 14 Bobrow to Jackson and/or Gray money and the payment of Jackson to Gray money or  
 15 otherwise fraudulently obtained money. This the government could not do.

16       One of the first and largest examples of evidence that should have been excluded  
 17 was the Craig Jackson \$6 million. The proof in trial was only that Mr. Harbour received  
 18 \$6 million from Craig Jackson in 2009. The government could not prove what happened

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22       <sup>1</sup> <https://www.justice.gov/usao-az/pr/scottsdale-man-convicted-investment-fraud>.

23  
 24       <sup>2</sup> The defense position for sentencing will be that the loss is actually zero and that is  
 25 because the defendant is only responsible for losses that are causally related to the illegal  
 26 conduct. The Green Circle losses are not causally related to Harbour's conduct. Burg and  
 27 Turasky lost money when PAIF foreclosed the Green Circle loan portfolio. PAIF lost  
 28 nothing. When it foreclosed, it made up its \$1.1 million with \$1.8+ million of money to  
 which PAIF had no entitlement at all. The government's "but for" causation theory is not  
 the type of causation recognized in this Circuit for determining offense severity.

1 to the \$6 million, other than that Harbour repaid the \$6 million in 2012. The government  
2 made the claim that Jackson's \$6 million was part of a Ponzi scheme and that Jackson's  
3 \$6 million was used to pay Bobrow and Case. This was never proven.  
4

5 There are no bank statements from prior to November 2010. The earliest extent  
6 bank statement showed a balance of \$64,000 on October 31, 2010. The government could  
7 offer no proof of where the money to repay Bobrow's and Case's 2007 loan in the  
8 amount of \$2.5 million came from. Specifically, the government did not show and could  
9 not show that Jackson money (2009) was used to pay Bobrow. Nor could the government  
10 show that payments to Bobrow and Jackson came from sources other than KSQ and/or  
11 Canyon Road, entities that the government failed to prove were frauds. The government  
12 was required to show that payment of the \$6 million loan came from fraudulently  
13 obtained property.  
14

15 The government also contended that Mr. Harbour took an additional \$9 million  
16 from Jackson, but this evidence was refuted by Jason Braun, Jackson's lawyer. Mr. Braun  
17 testified that the \$9 million never went to Mr. Harbour, it went to Tony Stacy at the Palo  
18 Verde Fund. The governments continued assertions that Mr. Harbour was responsible for  
19 the \$6 million plus the \$9 million as part of a 'fraud' was factually incorrect and should  
20 never have been allowed to be argued to the jury.  
21

22 This issue continues with the remaining individuals who were named in the  
23 indictment but not identified in any particular counts.  
24

25 Joe Cathey never met Mr. Harbour until after the payments stopped in September  
26 of 2013. Prior to that, all of Mr. Cathey's dealings were solely with Mr. Dunsworth. No  
27  
28

1 representations were made nor could have been made to Cathey by Harbour and there is  
 2 no conspiracy charge in the SSI.

3 There is also no proof that Dunsworth or Harbour received finder's fees based  
 4 upon Cathey's loans to NorthRock. The exhibit relied upon by the government witnesses,  
 5 the so-called 25%/30% Agreement is between DNA and KSQ, not between NorthRock  
 6 and KSQ.

7 The wealth evidence the government introduced should also never have been  
 8 admitted and tainted the jury. The government showed no more than that the "wealth"  
 9 was purchased during 2011-2013 when Harbour was making an enormous amount of  
 10 money from KSQ and Canyon Road. The government did not establish any links between  
 11 allegedly fraudulent money and items Mr. Harbour purchased.

12 The failure of the government to meet the tests established by the Court led both  
 13 the admission of evidence concerning wealth and evidence concerning prior acts that  
 14 should have not been admitted. Its admission severely prejudiced the Defendant. The  
 15 prejudice was severalfold. We have already shown that the evidence of wealth and of  
 16 "other acts" was designed to make the Defendant appear "bad" to the jury.<sup>3</sup> The  
 17 admission of this evidence also set-up the government's threatening email, which is what  
 18 kept Harbour from testifying.

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24  
 25 <sup>3</sup> The other acts were the 2007 Spaulding Loan, the 2009 Jackson \$6 million loan, the  
 26 2010 Gray \$1 million loan and the 2021 Georgia Avenue property transaction permitted  
 27 as Rule 404(b) evidence.  
 28

## CONCLUSION

Mr. Harbour was denied a fair trial due to the governments misleading to the Court regarding the source of wealth-based evidence and the admission of evidence on individuals not connected with any counts in the indictment. As such, if this Court denies the Rule 29 motion, the only appropriate remedy is to grant a new trial pursuant to Rule 33.

RESPECTFULLY SUBMITTED this 16<sup>th</sup> day of March 2023.

## CHRISTIAN DICHTER & SLUGA, P.C.

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 16, 2023, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF system for filing and for transmittal of Notice of Electronic Filing to the following CM/ECF registrants:

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